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In The

Supreme Court of the United States

October Term, 1973

No. 73-82

PHILIP M. CARDEN, *Petitioner*

vs.

ELBERT D. BROOKS, Director of Schools, and C. R. DORRIER, L. C. BIGGS, I. T. CRESWELL, W. J. HARBISON, MRS. IRWIN ESKIND, WALDEN S. FABRY, MRS. C. F. MAGER, FRANK T. GRISHAM, and W. W. BERRY, Members of the BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; THE CONCERNED PARENTS ASSOCIATION, INC.; RICHARD L. VEACHIE; MRS. NELL VEACHIE; JERRY GARRETT and DON GARRETT bnf RICHARD L. VEACHIE; WARREN GRAHAM; MRS. BARBARA GRAHAM; SHANNON GRAHAM bnf WARREN GRAHAM; ROBERT LUNN; ROBERT LUNN, JR., bnf ROBERT LUNN; RICHARD H. KOTSCH; ROBERT KOTSCH bnf RICHARD H. KOTSCH; HORACE McKENZIE; MRS. BETTY McKENZIE; MARK McKENZIE bnf MARY CARROLL McKENZIE and HORACE McKENZIE; MRS. JAMES HALEY; JUDY HALEY bnf MRS. JAMES HALEY; WALTER CHRISMAN; BRENDA CHRISMAN bnf WALTER CHRISMAN; MRS. DON WISDOM; DONNA R. WISDOM bnf MRS. DON WISDOM; FRANK McCOOL; RANDY McCOOL bnf FRANK McCOOL; RUFUS E. McKENZIE, JR.; TONY McKENZIE bnf RUFUS E. McKENZIE, JR.; HARDIE BROOKS; MRS. PAT BROOKS; KIMBERLY BROOKS and KEN BROOKS bnf HARDIE BROOKS; ANNA CANTRELL; CHARLES CANTRELL, JR. bnf ANNA CANTRELL; MRS. HAROLD BEVELS; CYNTHIA DENISE BEVELS bnf MRS. HAROLD BEVELS; ANDREW TURBEVILLE; MRS. ANDREW TURBEVILLE; MARTY TURBEVILLE bnf ANDREW TURBEVILLE; MRS. KAY JONES; DONALD WOMACK bnf MRS. KAY JONES; MRS. JACK ENGLE; ANN ENGLE bnf MRS. JACK ENGLE; BERNADINE P. COILE; MELINDA COILE bnf BERNADINE P. COILE; ZELDA YOUNG KETTERMAN; BOBBY YOUNG and JOYCE YOUNG bnf ZELDA YOUNG KETTERMAN; NEIL PYBURN; MRS. FLORA KAY PYBURN; RONALD LEE PYBURN, RHONDA LYN PYBURN; RAMON PYBURN bnf NEILL PYBURN; and JACK KERSHAW, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions Below

The opinion of the District Court has not been published. There was no opinion accompanying the original Court of Appeals Clerk's order affirming the judgment below. The Clerk's order denying a petition for rehearing was accompanied by a brief dissenting opinion of one judge. Neither the orders nor the opinion have been published, but all are appended hereto.

Jurisdiction

(i) The judgment sought to be reviewed was entered in the Court of Appeals on February 14, 1973. (ii) The order denying this petitioner a rehearing was entered April 9, 1973. (iii) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. In an action by state court defendants to enjoin state court plaintiffs from proceeding with a lawsuit allegedly seeking to interfere with a prior federal injunction along with purely state relief, did the District Court deny the petitioner his liberty and property without due process of law by:

(a) On its own motion making the petitioner a party defendant because he was listed as associate counsel in the state court complaint, exhibited to the federal court complaint but not otherwise named therein in any way.

(b) On its own motion issuing a restraining order against the petitioner without notice and then issuing a permanent injunction against him after less than an hour's hearing a week later.

2. Did the Court of Appeals likewise deny the petitioner due process by affirming the lower court

without adequate hearing and without articulating any reason except one refuted by the record of the prior case, then before the appellate court and called to its attention.

3. Whether both courts below erred in holding that all of the state court plaintiffs, their attorney, and associate counsel, were bound by a then non-final prior injunction issued in a case to which none of them were parties by class action representation or otherwise, although at least one of the state-court plaintiffs had sought intervention therein along with others similarly situated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, Constitution of the United States

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . . "

Fourteenth Amendment, Constitution of the United States

"No state shall . . . deny to any person within its jurisdiction the equal protection of the law."

28 U.S.C. Sec. 2283

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

Prior to February 22, 1972, the United States District Court for the Middle District of Tennessee entered an injunctive decree against the respondent School officials herein, in the case of *Kelley*, et al, vs. *Metropolitan County Board of Education*. On February 22, 1972, the Concerned Parents Association, Inc., and a large group of parents and school children who were among a class of people who had been denied the right to intervene in *Kelley*, filed an action in the Chancery Court of Davidson County, Tennessee. They sought protection of certain state and federal rights, including but not limited to the right to physical safety while the school children were in custody of the respondent School officials, the right to have the schools administered on sound educational basis, and the right not to be subjected to racially-discriminatory practices, and the right to have their School officials exercise powers and duties imposed on them by state law and the opinions of this court. They asserted the School officials had acted illegally and unconstitutionally by imposition or withholding of discipline on the ground of race, while pretending to justify their actions upon the judgment of the United States District Court in the *Kelley* case.

Though the case was filed partly on the basis of the protection afforded by the express commands of the Equal Protection Clause of the Fourteenth Amendment, as interpreted by this court, the school officials failed to either remove the case to federal court or to file any motion, answer or other plea, meanwhile making agreements as to the manner evidence was to be taken in the chancery court, the state-court plaintiffs filed a motion for a default, which was orally granted from the bench on April 7, 1972, but never entered on the minutes.

Before 1:40 p.m., on that same date, the school officials had presented to the United States District Court a motion, treated as a complaint, seeking an injunction against the state-court plaintiffs (4A-6A), without any affidavit of inability to contact the attorneys for those state-court plaintiffs. The complaint made no allegations against this petitioner, and did not even name him, and in all the papers presented to the District Court, there was no evidence even identifying this petitioner, except for the bare fact that his name and purported signature appeared as "Of Counsel" (23A),[1] on a copy of the state-court complaint which was appended to the application for temporary restraining order (7A-23A). Without requiring the school officials to amend either their allegations or prayers, the District Court of its own motion ordered the Petitioner Carden made a party defendant, along with the principal attorney for the state-court plaintiffs, Jack Kershaw, Esq., and issued a restraining order against all those state-court plaintiffs and their attorneys.

The District Court a week later held a hearing of less than one hour on the question of whether a temporary injunction should issue, as well as upon the defensive motions filed by this petitioner. On the basis of this hearing alone, the District Court issued a perpetual injunction against this petitioner personally, enjoining him not only from making any further appearances in the state case, "from filing any additional documents, papers, requests, injunctions, pleadings, or making any oral requests . . . " in the state court action and from "taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court . . . " in *Kelley* (86A).

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[1]Parenthetical references are to the record in the Court of Appeals.

In the course of the hearing before the District Court which led to the issuance of the permanent injunction in a manner contrary to the Federal Rules of Civil Procedure, the learned District Court took judicial notice of the entire record in the case of *Kelley* vs. *Metropolitan County Board of Education*, at that time on appeal to the United States Court of Appeals for the Sixth Circuit. It was stipulated before the Court that the Chancellor before whom the case was to have been tried in the state court was "a highly competent and highly responsible judicial officer of the State of Tennessee, whose qualifications are beyond question." (29 A).

On appeal to the United States Court of Appeals for the Sixth Circuit, it was brought to the attention of that Court that this Court has long held that the commands of due process of law require that no judgment of any court shall be binding upon persons who have not been subjected to the Court's jurisdiction and been given an opportunity to be heard, that in fact the *Kelley* case decision was not binding upon the state-court plaintiffs because they were not parties to that case and because neither they nor any class of defendants in the *Kelley* case who were subject to the authority of the defendant school officials and who objected to the proposed plan and the use of that authority to engage again in racial discrimination in school assignments. It was demonstrated to the Court of Appeals that several persons, including, at least one of the state-court plaintiffs had sought to intervene as defendants in the *Kelley* case, and were refused permission to intervene (93 A), and that the District Court had uniformally refused to allow objecting citizens to be heard.

It was further demonstrated to the Court of Appeals that the District Court's assumption that a

mere default judgment in the state court had the effect of an injunction against compliance with the prior Federal Court injunction was in fact an inaccurate interpretation of state law; that the state decisions upon which the District Court had relied simply concerned the *res judicata* effect of a final judgment of a state *law* court based on a final default judgment. None of the cases cited by the District Court involved the effect that should be given a default judgment, or *pro confesso*, under state chancery practice, which was demonstrated by state authorities, both statutory, decisional, and by state rules of procedure, not to entitle a chancery plaintiff to the relief sought.

Despite the immense complexity of the questions involved in the case, the fact that there is no theory of law under which this petitioner's clients could be deemed bound by the *Kelley* case injunction to the extent of destroying *their* constitutional rights, the Court of Appeals allowed only 30 minutes argument for three attorneys, for separate appellants to divide and did not even deliver an opinion on these complex issues nor on the unique and unprecedented device of issuing an injunction of such breadth against an attorney without either allegations or prayers for such relief.

The Court of Appeals directed entry of an order by the Clerk of the Court, which did not endeavor to refute any of the arguments put forward by this petitioner, except his single assertion that the doors of the District Court had been closed to the state court plaintiffs. And in trying to respond to this assertion, the Clerk of the Court of Appeals merely quoted two sentences from that Court's own recent opinion in the *Kelley* case, including this conclusion: "Thus, upon our affirmance, the door of the District

Court is clearly open (as it has been!) *to the parties* to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future." (Emphasis added) (infra, p. 25-26).

On the present petitioner's petition to rehear with suggestion for rehearing *en banc*, the petitioner again invited the attention of the Court of Appeals to the fact that the doors of the District Court in fact had not been open to the state-court plaintiffs, and that it was immaterial whether the state-court plaintiffs had access to the federal court, because they had filed their case in a court of competent jurisdiction, they were not required to choose the United States District Court as their forum, particularly when it had been closed to them, and the injunction had issued before there was the slightest interference with the prior non-final federal-court injunction.

The Court of Appeals denied the petition for rehearing with one judge, not on the original panel, dissenting.

The dissenting judge in the Court of Appeals recognized that the District Court "had denied intervention to a number of persons seeking to intervene [in the *Kelley* case]." (infra, p. 28). But the dissenting judge felt that the District Court should have ordered this injunction case consolidated with the *Kelley* case in order that the state-court plaintiffs might submit their claims for adjudication. However, the merits of the state-court case were not before the District Court for consolidation because that case had not been removed within the time permitted by law.

Throughout, this petitioner made it a strong point of reliance that a state court chancellor was a com-

petent and responsible judicial officer, who therefore could not be expected to bring about a clash between the federal and state judicial systems, but who should be expected to carry out his judicial duties in a competent and responsible fashion.

ARGUMENT

Certiorari should be granted because the judgments of the courts below are contrary to controlling statutory commands, contrary to applicable provisions of the Federal Rules of Civil Procedure, and contrary to past decisions by this Court. More importantly, the writ should be granted because the Court of Appeals has decided, without even attempting articulation of any supporting rationale, an important question of federal law which has not been, but which should be, settled by this Honorable Court. So far as counsel has found, there has never been a parallel case of the misuse of claimed injunctive powers in the entire history of Anglo-American jurisprudence, save possibly for pre-1640 actions by the Court of Star Chamber. Furthermore the actions of the courts below so far departed from the usual course of judicial proceedings and constitutional principles as to invoke this court's exercise its jurisdiction to require proper procedure in federal courts.

In actuality, finding the doors of the federal courts closed to certain of their numbers who sought to intervene in the *Kelley* case, the numerous plaintiffs brought their complaints before a state chancery court sworn to uphold the Constitution of the United States as the supreme law of the land. Now barred by injunction issued by the District Court, they asserted to the Court of Appeals and now assert that they are not intermeddlers seeking to interfere with

the enforcement of the *Kelley* case injunction, but are citizens who sought protection of their own individual constitutional rights in proper judicial proceedings in a proper forum.

The petitioner asserted and asserts that his clients were not bound by the *Kelley* judgment because the only basis for claiming them to be bound must be found in the class action provisions of Rule 23, Federal Rules of Civil Procedure. Such rule provides that "one or more members of a class may . . . be sued as representative parties on behalf of all . . ." It is clear that by no stretch of specious reasoning can it be maintained that school officials engaged in alleged violation of the constitutional rights of the state court plaintiffs, can be members of the same class of those citizens whose constitutional rights they are allegedly violating; and there being no body of protesting citizens made defendants and supposedly empowered to defend on behalf of all objecting citizens in that class, by the express provisions of Rule 23, the *Kelley* decision is not binding upon the state-court plaintiffs or their counsel.

Past decisions of this court, including *Pennoyer* v. *Neff*, 95 U. S. 714, *Shelley* v. *Kraemer*, 334 U. S. 1, *Hanson* v. *Denckla*, 357 U. S. 235, established that due process of law require that judgments of courts not be binding upon strangers who had not been subjected to the court's jurisdiction and been given the opportunity to appear and be heard; that such minimal meaning of due process of law has been reaffirmed by this Court in its decision in *Fuentes* v. *Shevin*, _____ U. S. _____, 40 L. W. 4692; and that this requirement of due process of law was resoundingly reaffirmed by this court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 329: "Due process pro-

hibits estopping [non-parties] despite one or more existing adjudications of the identical issue which stands squarely against their position."

This petitioner, in taking part in the commencement of the state-court litigation, subjected the state-court plaintiffs to the risk of removal to the United States District Court with pleadings framing the issues more broadly than they could have been if they invoked the jurisdiction of the United States District Court directly. The state court was empowered to deal with state legal and constitutional rights as well as federal constitutional rights. In asserting in the state court pleading that the decision in the *Kelley* case was to no extent binding upon his clients, this petitioner only asserted what this Court has repeatedly held to be the law by holdings which cannot be abandoned without abandonment of the concept of government of laws.

When the case was not removed from the state court to the United States District Court, it nevertheless remained one which would eventually be subject to review by this Court and it was necessarily the object of the petitioner to arrive eventually before this Court with the merits of his contentions.

It was not within the injunctive powers of the District Court to enjoin the state court proceedings at that stage, because no state process had been issued to interfere with the judgment theretofore entered in the *Kelley* case. As demonstrated to the learned Court of Appeals, 28 U.S.C. § 2283 expressly forbids the issuance of an injunction by any court of the United States against state court proceedings except "where necessary . . . to protect or effectuate its judgments." It was thoroughly demonstrated that under Tennessee law, both common law, statutory, and under the Tennessee Procedural Rules, a judg-

ment *pro confesso* or by default constituted no interference, and did not automatically entitle the state-court plaintiffs to the relief sought, but left the respondent School officials free to contest everything except facts admitted by the *pro confesso* or default. Issuance of the injunction by the District Court was contrary to this Court's prior construction of 28 U.S.C. § 2283 in *Atlantic Coast Railroad Company* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, and in *Donovan* v. *Dallas*, 377 U.S. 408, which follow the rationale that even in re-litigation cases, each judicial system, state and federal, should be free to pass upon the question of law as to the effect to be given to a prior judgment of the other system, subject to eventual review by this Court. Obviously, the Chancellor, being properly advised in the complaint of the existence of the *Kelley* case decree, could not avoid the obligation to determine what effect it should have against the state court plaintiffs.

Under the express provisions of Rule 65(d), Federal Rules of Civil Procedure, an injunction issued by a United States District Court "is binding *only* upon the parties to the action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." This was material because the petitioner, if the District Court could properly issue an injunction against the state-court plaintiffs, would be bound by such injunction under the specific provisions of Rule 65(d), in regard to his continued representation of those particular persons, so that there was absolutely no basis for making him a party defendant and enjoining him, even if there had been allegations against him and prayers for relief against him. The provisions of the rule are further material in that they amplify the non-bind-

ing effect of the *Kelley* injunction, because the state-court plaintiffs are not officers, agents or servants of the school officials, nor were they acting in concert with the school officials, but were fighting those officials with all the legal means at their command, in the manner that good citizens should follow in an endeavor to protect their own personal rights.

The petitioner has a property right to be free to use his talents and scholarship to protect the Constitutional rights of those who employ him, and that such endeavors included the obligation to assert that their constitutional rights could not be destroyed in a case in which they were not parties. Even the judicial powers of the United States do not transcend the Constitution of the United States. They, too, are an inferior type of power when compared to the Constitution itself. No power exists within any branch of the government of the United States to direct or authorize any state governmental agency, including the respondent school officials, to violate the Constitution.

This petitioner, as an attorney licensed to represent clients, must have the freedom to take legal positions which he believes to be well founded and which he believes to be in support of the Constitution of the United States. If this liberty in the hands of professional practicing attorneys is destroyed by government, the seeds will have been planted for the destruction of Constitutional government.

An injunction must be obeyed, as this petitioner recognizes, by all persons upon whom the injunction is binding. But this petitioner asserts that it is constitutionally impossible to convert the simple *Kelley* case injunction, broad though it be, into a different type of writ in subsequent legal proceedings—to con-

vert it into a writ in scope and effect the same as a regal edict, binding upon all mankind, including persons who, if the law be followed, are in no way bound by such decree. It is not in accord with the American system of constitutional government that the federal courts may govern the people of Nashville, by injunctions in proceedings in which no class of objecting citizens have been permitted to be heard. When the docket entries in the *Kelley* case (87A-98A, 88A, and 96A) establish that citizen-defendants were not permitted to intervene and be heard before their constitutional rights were destroyed pursuant to federal judicial decree, such past destruction cannot be rendered non-existent by subsequent judicial declaration that the doors of the Court have always been open.

The petitioner, acting out of true dedication to the Constitution of the United States, sought in a Court of competent jurisdiction to protect Constitutional rights secured against violation by the respondents Board of Education by the Equal Protection Clause of the Fourteenth Amendment; but his legitimate endeavors were blocked and the property rights included in his license to practice law were permanently destroyed by the United States District Court and by the United States Court of Appeals for the Sixth Circuit by procedures totally contrary to the Due Process Clause of the Fifth Amendment.

It is respectfully submitted that those procedures and judgments cannot be allowed to stand because they have destroyed the Constitutional rights of the petitioner and his clients and they have planted a poisonous precedent for the future within a judicial system commanded to perpetuate every provision of the Constitution of the United States as the Supreme

Law of the Land, past interpretations and other inferior law to the contrary notwithstanding.

Respectfully submitted,

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APPENDIX

Order and Opinion of the United States District Court For The Middle District of Tennessee

APRIL 28, 1972

In the United States District Court For The
Middle District of Tennessee
Nashville Division

ELBERT D. BROOKS, et al

vs.

THE CONCERNED PARENTS
ASSOCIATION, INC., et al

Memorandum and Order

Upon hearing of this motion for preliminary injunction the court took judicial notice of the following matters which provide the background history of this action and which defendants conceded to be accurate.

"City Schools

"The first desegregation case, styled *Kelley v. Board of Education of the City of Nashville,* Civil No. 2094, was filed in the United States District Court for the Middle District of Tennessee on September 23, 1955. The court subsequently held that the City of Nashville was guilty or

compulsory segregation. *Kelley v. Board of Education of the City of Nashville*, 159 F. Supp. 272 (M.D. Tenn. 1958).

"No appeal was taken from this holding of compulsory segregation, and a grade a year plan was subsequently approved.

"County Schools

"The case of *Maxwell v. Board of Education of Davidson County*, Civil No. 2956, was filed in the United States District Court for the Middle District of Tennessee on September 19, 1960. The court subsequently held that Davidson County was guilty of compulsory segregation. *Maxwell v. Board of Education of Davidson County* 203 F. Supp. 768 (M.D. Tenn. 1960).

"No appeal was taken from this holding of compulsory segregation.

"Consolidated Cases

"By order of September 10, 1963, the county and city cases were consolidated and the Metropolitan School Board eventually became the defendant therein.

"On July 16, 1970, my predecessor as district judge once again found Nashville and Davidson County guilty of continuing segregation and set forth the affirmative duty of abolishing dual school systems 'at once.' *Kelley v. Metropolitan County Board of Education*, 317 F. Supp. 980 (M.D. Tenn. 1970). No appeal was taken from the holding that Nashville and Davidson County were guilty of compulsory segregation.

"It has thus been adjudicated on two occasions that Nashville and Davidson County were guilty of *de jure* segregation in their schools. When this judge assumed the bench, this was the status of the record.

"On December 18, 1970, the Sixth Circuit Court of Appeals ordered the present district judge to implement a plan to establish a unitary school system. It was suggested in the opinion [by reference to the case of *Carter v. West Feliciana Parish School Board*, 396 U. S. 290 (1970)] that this plan should be implemented in a time period not to exceed eight weeks.

"On April 20, 1971, the Supreme Court of the United States issued its opinions in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971) and *Davis v. Board of School Commissioners,* 402 U. S. 33 (1971).

"On June 28, 1971, this court issued its opinion. This opinion was deliberately couched in simple and uncomplicated language which should be readily understandable by the average layman. A unitary school system was established. There was no requirement for a fixed racial balance. There was no requirement for the use of bussing for the purpose of achieving a racial balance. There was the elimination of all black schools and the establishment of a unitary school system. A copy of this opinion is attached hereto as Exhibit A.

"This decision was appealed to the Sixth Circuit Court of Appeals. The appeal attacked the plan but not the fact that Nashville and Davidson County, until the compliance with this court's opinion, had been guilty of compulsory segregation in the schools.

"State Proceedings

"On February 22, 1972, the case of *C.P.A., Inc. v. Elbert D. Brooks, Director of Nashville Metropolitan Schools, et al.*, No. A-1298, was filed in the Chancery Court of Davidson County, Tennessee. The attorneys of record for the plaintiffs are Jack Kershaw and Philip M. Carden. A copy of the original bill in the Chancery Court is attached to the original complaint in this cause.

"A perusal of the bill reflects that declaratory relief and injunctive relief are sought.

"As to the declaratory relief, the state court is requested to determine whether or not *de jure* segregation exists in the Metropolitan school system, to interpret the federal law and determine whether the decree of the United States District Court for the Middle District of Tennessee is void, and to determine whether or not the defendant Metropolitan School Board, in complying with the federal court order, is acting arbitrarily and capriciously.

"As to the injunctive relief, the state court is asked to prohibit the defendant in the state action from complying with the order of the United States District Court for the Middle District of Tennessee."

On Friday, April 7, 1972, the Chancery Court, Part II, of Davidson County, entered a default judgment in favor of plaintiffs to that action. On motion of defendants to that action, this court entered a temporary restraining order restraining *inter alia* "any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of *Robert W. Kelley, et al. v. Metroplitan County Board of Education.*" In its opinion in *Kelley*, this court, in compliance with the law as set forth by the United States Supreme Court

and the directives of the Sixth Circuit Court of Appeals, ordered the establishment of a unitary school system in Metropolitan Davidson County.

In their complaint in the Chancery Court proceeding, No. A-1298, at pages 14, 15 the principal relief sought by plaintiffs to that action is the following.

X

"The plaintiffs aver that they are entitled to a temporary injunction prohibiting the defendants, or any of them, from requiring any student to attend any particular school against the will of such student or his parents, or assigning any student to any school so far from his home that he must spend more than half an hour in transit and awaiting transportation under normal operating conditions, or assigning more pupils to distant schools than can be transported with present buses properly maintained with adequate reserves for breakdowns in normal school hours, and further prohibiting the defendants from withholding from pupils and parents full and truthful information with respect to violence and threats thereof at any school to the end that parents and pupils may be able to make an informed judgment for themselves whether they are willing to incur the risks of complying with assignment to such schools.

"They further aver that upon final hearing they are entitled to have such injunction made permanent with additional provisions prohibiting the defendants from misusing educational funds to support excessive busing, from making any pupil assignments on any basis other than educational criteria developed upon a sound development of facts by qualified specialists, and from making any assignments or imposing or withholding any discipline on racial grounds, together with such other provisions as may

appear necessary upon the hearing to protect the rights of the plaintiffs and members of their classes.

"The plaintiffs aver that unless such injunctive relief is granted they and each of them will be irreparably damaged because of deprivation of their constitutional rights and the denial of proper and timely educational opportunities for continuously growing pupils, and that in the absence of such injunctive relief the risk of death or serious bodily harm or disease will continue to increase and may actually be realized before a final resolution of the issues herein."

Further, plaintiffs to the Chancery action sought a permanent injunction upon final hearing of the matter in accordance with the above Section X. Also, certain declaratory relief was sought.

A default judgment was entered which purported to give the relief sought.

"A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties or their privies." *Taylor v. Sledge*, 110 Tenn. 263, 75 S.W. 1074, 1075 (1903).

"A judgment by default is as conclusive as one rendered in a case where defendant appears as to all matters properly in issue." *Beare v. Burnett*, 162 Tenn. 610, 39 S.W.2d 737 (1931).

It is obvious that plaintiffs to the Chancery action were attempting to defeat and destroy the order of this court in *Kelley*, which order had the effect of establishing a unitary school system as required by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It

should be obvious to anyone with a basic knowledge of the law that the Chancery Court had no legal authority to so interfere with the order of this court in *Kelley*.

Section 2283 of Title 28 of the United States Code provides in full:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, *or where necessary in aid of its jurisdiction, or, to protect or effectuate its judgments.*" (Emphasis supplied).

The court holds that § 2283 is controlling here. The default judgment is in direct conflict with the prior order of this court in *Kelley*. The default judgment with the injunctive relief provided for would have the effect of unlawfully wresting jurisdiction of the *Kelley* case from this United States District Court where the case was properly instituted and decided, jurisdiction being retained. Furthermore, an injunction against the operation and maintenance of a unitary school system, as provided for in the default judgment, would effectively defeat and destroy the judgment of this court in *Kelley*.

The authority is clear that under § 2283 a United States District Court may prevent such a nullification of its jurisdiction and judgment by the injunctive process. *Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958); *Montgomery County Board of Education v. Shelton, 327 F.Supp. 811 (N.D. Miss. 1971); United States v. American Society of Composers, Authors and Publishers*, 442 F.2d 601 (2nd Cir. 1971). *See also Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952).

Moreover, United States District Courts have authority to prevent interference with its integration orders and protect rights guaranteed by the United States Constitution by the injunctive process. *Bullock v. United States*, 265 F.2d 683, 691

(6th Cir. 1959), *cert. denied* 360 U.S. 909 (1959) and 360 U.S. 932 (1959), *reh'g. denied* 361 U.S. 855 (1960); *United States v. Farrar*, 414 F.2d 936 (5th Cir. 1969); *Kasper v. Brittain*, 245 F.2d 92, 95 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957), *pet. for reh'g. denied* 355 U.S. 886 (1957); *Brewer v. Howie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *United States v. Wallace*, 218 Supp. 290 (N.D. Ala. 1963); *Mapp v. Board of Education of the City of Chattanooga*, Civil No. 3564 (E.D. Tenn. filed February 4, 1972). *See also, Montgomery County Board of Education v. Shelton, supra.*

Defendant attorneys Philip M. Carden and Jack Kershaw assert that the court should dismiss them as party defendants to this action. However, Rule 65 (d) of the Federal Rules of Civil Procedure provides that "[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Thus, attorneys may properly be enjoined by a United States District Court.

Defendants Carden and Kershaw, as attorneys, sought and obtained from a state court a default judgment, which is now *res judicata* as to the issues involved and which, if allowed to stand, would directly contradict and interfere with a valid order of this court. Defendants Carden and Kershaw clearly must have known that the state court had no legal authority to enjoin a valid order of this court.

The court holds that defendants Carden and Kershaw are proper parties defendant to this action and should be enjoined from any further attempts to interfere with the implementation of the orders of this court in *Kelley*.

The default judgment entered in Chancery Court placed the Metropolitan County School Board in an untenable position. The school board was bound by an order of this court to implement a unitary school system, while at the same time being faced with a default judgment from a state court having

the apparent effect of enjoining compliance with the prior order of this court. This court feels that a permanent injunction should issue to halt this interference with its order in *Kelley*. It is true that ordinarily under Rule 65 of the Federal Rules of Civil Procedure a permanent injunction may not be granted upon the hearing of a motion for a temporary injunction. However, in this case no material issues of fact exist, the issues before the court being issues of law. Furthermore, another hearing would unnecessarily delay the final determination of this action and require needless effort and expense on the part of the parties. *See Standard Oil Co. of Texas v. Lopeno Gas Co.*, 240 F.2d 504, 509, 510 (5th Cir. 1957).

Therefore, the named defendants to this action and any and all attorneys whom they may employ are hereby permanently enjoined from filing any additional documents, papers, requests, injunctions, pleadings, or making any oral requests in the cause styled *The C.P.A., Inc. et al. v. Elbert D. Brooks, Director of Nashville Metropolitan Schools, et al.*, No. A-1298 in the Chancery Court of Davidson County, Tennessee. In particular, the defendants and each of them and any and all attorneys whom they may employ are specifically enjoined from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States District Court for the Middle District of Tennessee in the case entitled *Robert W. Kelley, et al. vs. Metropolitan County Board of Education.* Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of *Robert W. Kelley, et al. v. Metropolitan County Board of Education.*

L. Clure Morton
United States District Judge

Order of the United States Court of Appeals
No.s 72-1572-73-74

United States Court of Appeals
For The Sixth Circuit

FEBRUARY 14, 1973

ELBERT D. BROOKS, et al.,

Plaintiffs-Appellees,

vs.

THE CONCERNED PARENTS ASSOCIATION, INC., et. al.

Defendants-Appellants.

Before: EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

In this case the United States District Court enjoined defendants "from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States District Court for the Middle District of Tennessee in the case entitled *Robert W. Kelley, et al. vs. Metropolitan County Board of Education.*"

In this court's affirmance of the District Court judgment in the above-styled case, this court pointed to the availability of the District Court for consideration of any problems arising subsequent to the entry of the desegregation order concerned:

> The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the

parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arisen in the future. *Kelley v. Metropolitan County Board of Education of Nashville, Tennessee,* 463 F.2d 732, 747 (6th Cir. 1972).

The judgment of the District Court is affirmed.

Entered by order of the Court

James A. Higgins
Clerk

No. 72-1572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed April 9, 1973

ELBERT D. BROOKS, et al.,
Plaintiffs-Appellees,

vs. ORDER

PHILIP M. CARDEN,
Defendant-Appellant.

Before: EDWARDS, CELEBREEZE and McCREE, Circuit Judges.

On receipt and consideration of a motion for rehearing in banc in the above-styled case, and the majority of the court not having voted in favor thereof (one Judge dissenting); and

Said motion having been referred to the original panel which heard the appeal,

The motion for rehearing is hereby denied for the reason that it presents no argument not previously given careful consideration before entry of the order of the court.

Entered by order of the Court

_____
Clerk

WEICK, Circuit Judge, dissenting:

It is not understandable why the Board of Education did not file its application for injunction in the *Kelley* desegregation case rather than instituting a separate and independent action in the District Court to enjoin the state court action. We hope it was not to forestall intervention in the *Kelley* case.

The suit in the state court had been instituted by the Concerned Parents' Association, Inc., and numerous parents and their minor children complaining about many violations of their constitutional rights resulting from various orders of the District Court entered in the *Kelley* case, and disastrous consequences to their children flowing therefrom; that the District Court had denied intervention to a number of persons seeking to intervene.

Had the Board proceeded in the *Kelley* case, as I think it should have, the state court plaintiffs could have been made party defendants and they would then have had their day in court on their claims of constitutional violation, with the right to appeal.

The action in the state court, in my judgment, was ill-advised. It could have resulted from frustration but this is no excuse. Nor is there any excuse for the intemperate language contained in the petition for rehearing.

The District Court in *Kelley* had first acquired jurisdiction and it was exclusive. The District Court had the right to enjoin any interference therewith. In my opinion, however, the growing practice of joining lawyers as party defendants with their clients in injunction cases should be disapproved. Lawyers are officers of the Court and are entitled to better treatment than that in the federal courts.

The District Court could have resolved the entire matter by consolidating the cases and determining whether the constitutional rights of the plaintiffs in the state court case have been violated by orders entered in the desegregation case.

I would remand to the District Court with instructions to allow intervention in the *Kelley* case and conduct an evidentiary hearing on the complaint of the intervenors.

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MICHAEL RODAK, JR

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-82

PHILIP M. CARDEN,

Petitioner,

v.

ELBERT D. BROOKS, et al.,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR REHEARING

CARROL D. KILGORE
216 Third Avenue North
Nashville, Tennessee

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-82

PHILIP M. CARDEN,

Petitioner,

v.

ELBERT D. BROOKS, et al.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

The petitioner respectfully prays the Court to grant him a rehearing of this Court's action of October 9, 1973, in denying his petition for certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree affirming a decree of the United States District Court for the Middle District of Tennessee.

It is respectfully submitted that the following questions not specifically set out in the previous petition should be considered, whether or not the Court desires to review the full merits:

1. Whether or not the Court of Appeals judgment should be vacated and remanded for clarification whether its order relates only to the single paragraph of the District Court's injunction quoted on the appeal (A25)[1] — or whether it also

[1] Parenthetical references are to pages of the appendix of the original petition for certiorari.

applies to the portion that added: "Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of Robert W. Kelly, et al. v. Metropolitan County Board of Education." (A24)

2. Whether the judgment below should be vacated and remanded for a full hearing on the merits without the defendants' original counsel being precluded from representing their clients in the federal court proceedings by the necessity of obtaining counsel for their own personal defense.

These are important questions affecting the future conduct of the petitioner and all other lawyers and questions which have never before been decided by this court or squarely decided by the courts below or any other court so far as present counsel is aware, although they have been implicit in the record from the beginning of the District Court's original precipitous action in making the petitioner a defendant on the Court's own motion.

The first question is especially important to the present petitioner's future liberty and property rights. The portion of the injunction quoted by the Court of Appeals (A.25) enjoined the defendant only from "seeking an injunction or restraining order."

The immediately following sentence of the injunction of the District Court, however, is capable of being interpreted by an angry judge in the future as applying to matters other than litigation and to actions in capacities other than as lawyers, including efforts to obtain a constitutional amendment, or to support legislative candidates who take or

promise to take actions to eliminate or ameliorate the evils of busing, as many candidates have done both before and since the injunction.

Indeed, it may be interpreted as preventing the petitioner, as lawyer or otherwise, from petitioning the school board or other state officials to take action within their continuing plenary responsibilities as stated by this court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This Court said in that case, *inter alia*, that:

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." [402 U.S. at 16]

> "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." [402 U.S. at 31-32]

This is especially true because the original state court complaint that initiated the present proceedings, included among its legal averments the essence of the first quotation above and included the second one verbatim, as well as other portions of the *Swann* opinion as bases for the State Court inquiry into the local school board's own decisions in implementing the plan approved by the United States District Court.

THE PREMISES CONSIDERED, the petitioner prays that he be granted a rehearing on his petition for the writ of

certiorari, and that upon the rehearing the writ be granted and the judgment below should be vacated and remanded for further hearing.

Respectfully submitted,

CARROL D. KILGORE
216 Third Avenue North
Nashville, Tennessee
Attorney for Petitioner

CERTIFICATE

It is hereby certified that the foregoing petition is presented in good faith and not for purposes of delay, and that its content is restricted to grounds believed to be substantial and to be available to petitioner, although not previously presented.

CARROL D. KILGORE
Attorney for Petitioner